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No. 83-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ESMAIL YERMIAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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SUMMARY OF ARGUMENT

Knowledge of federal jurisdiction is an essential element of 18 U.S.C. § 1001 when the statute is interpreted in light of its legislative history and basic principles governing the operation of criminal statutes.

Section 1001 proscribes false as well as fraudulent statements. The importance of this fact is that the mere making of a false statement to a private party, without the intent to defraud, is not in all instances an act proscribed by state criminal law. In these instances, knowledge of federal involvement is the sole factor which converts an otherwise innocent statement into a criminal act. Since an individual making such a statement will have received no prior notice as to the criminality of his conduct, it is essential that such an individual's liability hinge on whether he knew his statement would reach a federal agency.

Because of careless drafting in the statute's 1948 amendment the scienter requirements of the statute are ambiguously stated. A question is therefore raised as to the statute's intended operation. However, the legislative history, when considered in its entirety, supports Respondent's argument that Congress intended to include knowledge of federal jurisdiction as an element of the offense.

Section 1001's original antecedent was the Act of March 2, 1863, ch. 67, 12 Stat. 696. The Act of 1863 was enacted solely to punish military personnel who knowingly presented false monetary claims directly to the United States.

Between 1863 and 1948, Congress amended the antecedents to section 1001 to respond to specific inherent limitations in the original statute. Thus, by 1934, the statute had been selectively broadened so that it would encompass false claims made directly to the United States even if made by non-military personnel. In 1934, it was again necessary to amend the statute to clarify that it encompassed non-monetary false claims and false statements. The 1934 amendment was drafted primarily in response to *United States* v. *Cohn*, 270 U.S. 339 (1926).

While Congress intended to protect New Deal programs from fraud, the Government's contention that Congress intended to punish persons unaware of federal involvement is not supported by the legislative history or the remarks of the President.

The legislation originally submitted to Congress in 1934 proscribed the knowing and willful presentation of false papers. Congress considered this bill, but adopted in lieu thereof legislation that incorporated the requirement of an "intent to defraud the government." It became necessary, however, to eliminate this language and substitute in its place "in any matter within the jurisdiction . . . of the United States" in the final 1934 enactment, so that the statute would reach false statements made to the government which defrauded a third party. It was for this reason, and not because Congress intended to eliminate knowledge of federal involvement from the culpability requirement of the statute, that the intent to defraud the United States language was deleted. The new phrase did not, however, signify a substantive departure from the earlier version of the 1934 bill which had been vetoed. The Court concluded that the new phrase "was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications, but only those made to government organs would be reached." *United States* v. *Bramblett*, 348 U.S. 503, 508 (1955).

While the 1934 statute included knowledge of federal involvement as an element of the offense, in 1948 the phrase "in any matter" was transposed to the beginning of the statute, to precede "knowingly and willfully." The 1948 revision thus created an ambiguity as to whether "knowingly and willfully" was still intended to modify the jurisdictional phrase which now preceded those words. The Court subsequently clarified that the 1948 amendment was not substantive. *United States* v. *Bramblett*, 348 U.S. at 508. Most courts continued to apply section 1001 in a manner consistent with the principle that knowledge of federal involvement was an element of the crime.

Even if the legislative history were not conclusive as to whether knowledge of federal jurisdiction is an element of the offense, application of the principle of lenity is required and yields a result favorable to the Respondent, since an ambiguity as to what Congress made a crime must be construed in favor of the defendant. *Ladner* v. *United States*, 358 U.S. 169 (1957).

Congress enacted section 1001 to proscribe the making of false statements when an individual knew of federal involvement. The purpose of the statute was to deter such behavior and this purpose cannot be served if knowledge of federal involvement is omitted from the elements defining the offense.

While Congress intended the statute to apply to a false statement made to an intermediary if the defendant knew of its ultimate destination, Congress never intended the statute to reach false statements submitted by persons unaware of the federal interest in the matter. The three courts of appeals which held to the contrary improperly relied on *United States* v. *Feola*, 420 U.S. 671 (1975), which construed the elements of an entirely different statute.

In *Feola*, the Court construed the scienter requirements of 18 U.S.C. § 111 (the federal assault statute) and held that knowledge that the victim was a *federal* officer is not an element of the offense. Because assault is always conduct which is criminal, federal involvement merely provides the jurisdictional basis for prosecution in another forum. *Feola* supports the proposition that when a statute merely provides a federal forum for prosecution of conduct that is already subject to criminal sanction under state law, it is not necessary for knowledge of federal jurisdiction to be an element of the crime.

The *Feola* decision provides a basis for understanding why section 1001, unlike section 111, must contain knowledge of federal involvement as an element of the crime. Unlike the conduct proscribed in section 111 (assault), conduct proscribed in section 1001 (false statements) is not always criminal or subject to state prosecution. For this reason, a scienter requirement as to federal involvement is necessary to prevent

section 1001 from creating what the Court in *Feola* characterized as a "snare for the unsuspecting." 420 U.S. at 685. The three courts of appeals that held contrary to the Ninth Circuit in the instant case erroneously concluded that the intent element of section 1001 was identical to that of section 111, merely because the two statutes shared the common *purpose* of protecting the integrity of federal functions. This reasoning failed to take into account that two criminal statutes may share a broad common purpose without being identical as to their scienter requirements.

The interpretation of the Ninth Circuit will not significantly hinder prosecution under section 1001. A survey of case law demonstrates that a defense of "no knowledge" of federal involvement is rarely asserted. In most instances the facts will overwhelmingly reveal that the defendant knew that the ultimate destination of his statement was a federal agency, even if his statement was made to an intermediary such as a state welfare agency or defense subcontractor. Thus, even in the few cases where defendants assert a "no knowledge" defense, the government can easily refute such a claim, due to the context in which the false statement is made. Indeed, a clear written warning regarding federal involvement placed on relevant forms, as was supplied in the instant case, will assure the government of adequate protection against a defendant's claim to a jury of no knowledge of federal jurisdiction. Merely because prosecution under section 1001 may, in some cases, be more difficult, does not justify eliminating the requirement that the defendant must be aware of federal involvement, nor does it justify ignoring Congressional intent.

The Government urges the Court to interpret section 1001 in light of recent trends in statutory drafting, in which the basis for exercising federal jurisdiction is separated from the basic criminal conduct as an element of the offense. In making this argument, the Government fails to acknowledge that at the time section 1001 was enacted, the mode utilized in drafting criminal statutes was to state the basis for exercising federal jurisdiction *together* with the criminal conduct as an element of

the offense. Therefore, Respondent's interpretation of section 1001 comports with the method of drafting that was employed when Congress drafted section 1001 and its antecedents.

The Government's interpretation is a result-oriented one that fails to take into account that section 1001, as drafted in 1948, was not intended to be a panacea for combatting today's complex social issues. The examples cited by the Government of how a false statement made in a matter of national security or nuclear energy could have serious effects upon the operations of Government raise obviously legitimate concerns. If section 1001's usefulness is somewhat lessened by an adoption of Respondent's interpretation, it is simply because the statute as envisioned at the time of its 1948 enactment was a statute of more modest applicability. If Respondent's interpretation of section 1001 is accepted Congress will, if it so desires, act to draft the legislation sought by the Government in it's brief.

The district court's instruction to the jury with respect to the element of knowledge of federal jurisdiction was insufficient. The district court instructed the jury that it could convict Respondent if it found that he "knew or should have known" of federal agency involvement. This instruction was insufficient because it allowed the jury to convict on an objective, rather than a subjective standard of knowledge. The jury instruction failed to meet even the requirements of the "recklessness" standard that the Government would urge the Court to adopt.

ARGUMENT

I. PROOF THAT A DEFENDANT KNEW HIS FALSE STATEMENT WAS IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES IS REQUIRED UNDER 18 U.S.C. § 1001

A. 18 U.S.C. § 1001 Is Ambiguous On Its Face With Respect To Its Scienter Requirements

18 U.S.C. § 1001 provides in pertinent part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any

false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Common sense analysis of the present statutory language leads to the conclusion that section 1001 is ambiguous on its face:

> While the phrase 'knowingly and willfully' clearly provides that specific intent is a crucial element of the offense, neither the grammatical construction nor the punctuation of the statute indicates whether the 'knowingly and willfully' phrase modifies only the phrase 'makes any false, fictitious or fraudulent statements' *or* the broader phrase 'in any matter within the jurisdiction of any department or agency of the United States . . . makes any false, fictitious or fraudulent statements.'

United States v. *Yermian*, 708 F.2d 365, 368 (9th Cir. 1983).

The Fifth Circuit also commented upon the ambiguous language of the statute, stating that while it is clear that the government must prove that the defendant made a false statement with intent to deceive, "it is quite unclear, however, whether the defendant must also know that his statement was material, i.e., that it was capable of influencing a federal agency. The statute can be read to require knowledge of materiality, and hence knowledge of falsity alone, but it can also be read to require knowledge of federal involvement." *United States* v. *Baker*, 626 F.2d 512, 515 (5th Cir. 1980).

Because the language of the statute is equally susceptible of either interpretation, extrinsic sources including legislative history must be consulted to determine whether they provide additional evidence of Congressional intent. *See Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

B. The Legislative History Of Section 1001 And Its Antecedents Establish That A Defendant's Knowledge Of Federal Involvement Has Always Been An Element Of The Offense

Definitive sources of legislative history for section 1001 consist of the legislative comments made before and during its enactments and subsequent amendments, as well as cases of the Court discussing the statute's history. Analysis of the legislative history makes clear that Congress never intended to eliminate knowledge of federal jurisdiction as an element of the crime.

Section 1001 has its historical origins in an 1863 statute enacted solely to punish military personnel who submitted false monetary claims to the United States government. The Act of March 2, 1863, ch. 67, 12 Stat. 696 (hereafter cited as "Act of 1863") made it a criminal offense for:

> any person *in the land or naval forces of the United States* . . . [to] make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, *any claim upon or against the Government of the United States*, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent. . . .

(Emphasis added.)

Furthermore, the Act of 1863 subjected to criminal prosecution

> any person *in such forces* or service who shall *for the purpose of obtaining*, or aiding in obtaining, *the approval or payment of such claim*, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain *any false or fraudulent statement* or entry. . . .

(Emphasis added.)

As evidenced by its clear language and its title ("An Act to Prevent Frauds Upon the Government of the United States"),

the Act of 1863 was intended to apply solely in circumstances where a member of the military knowingly dealt directly with the United States government.

In *United States* v. *Bramblett*, 348 U.S. 503 (1955), the Court noted that the prohibition of the 1863 statute was broad, but "limited to military personnel." *Id.* at 505. Implicit in the statute's premise was the military claimant's knowledge that he was dealing with the government.

In 1873, Congress responded to the problem that the Act of 1863 reached only false claims made by members of the military by amending the statute. "Under the codification of December 1, 1873, approved June 22, 1874, R.S. § 5438, the statute was extended to cover 'every person'—not merely military personnel." *United States* v. *Bramblett*, 348 U.S. at 506 n.2. The revised statute imposed liability upon civilians who submitted false claims directly to the United States.

In 1908 a subsequent amendment recodified R.S. § 5438 as section 35 of the Criminal Code and simply altered the statutory penalties. 348 U.S. at 506 n.2.

In 1918 Congress redrafted the statute (Act of October 23, 1918, ch. 194, 40 Stat. 1015)[1] so that the false claims provision covered false statements to corporations in which the United States held stock, as well as false statements made directly to

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[1] The 1918 statute read in pertinent part: "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, *any claim upon or against the Government of the United States*, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, *knowing such claim to be false, fictitious, or fraudulent;* or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose *and with the intent of cheating and swindling or defrauding the Government of the United States, or any department*

the government without the presentation of a monetary claim. *See United States* v. *Cohn*, 270 U.S. 339, 340 (1926). In *Cohn*, the defendant made a false statement to a United States Custom Inspector, not for the purpose of defrauding the United States, but for the purpose of defrauding a third party. Since there was no import duty owing to the United States, there was no "claim" against or defrauding of the government. Therefore, the Court held that section 35 had not been violated. The Court's ruling in *Cohn* rendered section 35 inapplicable to situations where there was no monetary claim presented to the government. The *Cohn* Court construed the 1918 statute as requiring that the defendant have the specific intent to defraud the government:

> The section punishes the concealment or misrepresentation of material facts whenever the defendant's purpose is to obtain the payment or approval of a claim, or to cheat and swindle or defraud the United States or any department thereof.

Id. at 340.

Construing the 1918 Act, the *Cohn* Court held that the statute would not apply when a defendant made a false statement to the United States for the purpose of obtaining a claim from a third party. Thus, after the *Cohn* decision, a defendant must have intended specifically to defraud the government to violate the statute. The mere making of a false statement to the Government was insufficient to invoke the statute.

Legislative and executive dissatisfaction with the fact that *Cohn* construed the 1918 statute as not applying to non-

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thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations . . . *shall be fined not more than $10,000 or imprisoned not more than ten years, or both.*" (Emphasis added.)

monetary claims,[2] prompted the 1934 amendment of section 35, which eliminated the requirement of a monetary claim against the United States. The 1934 statute employed broader language prohibiting the making of a greater variety of false or fraudulent statements "in any matter within the jurisdiction of any department or agency of the United States." Act of June 18, 1934, ch. 587, 48 Stat. 996. *See United States* v. *Bramblett*, 348 U.S. at 507 n.4; *United States* v. *Mellon*, 96 F.2d 462, 463 (2d Cir.), *cert. denied*, 304 U.S. 586 (1938). *See also*, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); *United States* v. *Lewis*, 587 F.2d 854, 856 (6th Cir. 1978). The Government suggests that this phraseology indicates that the "in any matter" language was no longer part of the culpability requirement. However, this contention has no support in the statute's legislative history.

The legislative process surrounding the adoption of the 1934 version of the statute instead indicates that Congress intended knowledge of federal involvement to remain an element of the offense. In 1934, the Secretary of the Interior, attempting to curb non-monetary frauds against the government, introduced S. 2686 in the House and Senate Judiciary Committees. S. REP. No. 288, 73rd Cong., 2d Sess. 2 (1934).[3] The House Judiciary Committee considered the legislation submitted by

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[2] *United States* v. *Bramblett*, 348 U.S. at 507.

[3] The Secretary's letter to the Senate Judiciary Committee read in pertinent part as follows: "A large number of cases are arising constantly in the enforcement of the laws relating to the Interior Department; the transaction of business in connection with the Public Works Administration; in violations of the Code of Fair Competition for the Petroleum Industry; and enforcement of regulations under section 9(c) of the National Industrial Recovery Act of June 16, 1933, which are not susceptible of successful prosecution on charges of perjury, and there is no law at present under which prosecution may be secured for the *presentation* of false papers." 78 CONG. REC. at 2858 (emphasis added).

the Secretary of the Interior but amended it so that it *specifically required* an intent to defraud the *United States government*. H.R. 8046, significantly entitled "Presentation of False Instruments with Intent to Defraud the United States," was accompanied by House Report No. 829, which commented that

> the rights of the accused are protected by the provision that the act must be committed willfully and knowingly *and with intent to defraud the United States*. It is essential to the public interest that the Government protect itself against acts committed under such circumstances.

78 CONG. REC. 9776 (1934) (emphasis added).

The Senate Judiciary Committee preferred the House version of the bill to that proposed by the Secretary of the Interior, and so adopted it. The Senate preferred the House version of the bill because it had been amended to require a specific intent to defraud the Government. 78 CONG. REC. 5746 (1934). Thus, the bill was directed to those persons who knowingly directed their fraudulent acts at the government. However, H.R. 8046 did not become the final version of the legislation.

The problem with the language of H.R. 8046, was that it would not apply where false statements were made to the United States in the course of perpetrating a fraud against a third party. Additionally, President Roosevelt was dissatisfied with the legislation because it effectively reduced the penalties already provided for in existing law. President Roosevelt, in explaining the Presidential veto, stated:

> The bill is objectionable in that its result would be to reduce the punishment for certain frauds against the United States.

78 CONG. REC. 6778-79 (1934).

Quickly following the Presidential veto, the Senate Judiciary Committee presented amendments to another bill, the purpose of which was to extend the 1918 Act to cover injury to United States property. The amendments proposed by the Senate served to broaden the scope of the 1918 Act by proscribing the presentation of false papers to a federal agency, even

where there was no monetary loss to the government, without lessening the penalties provided in the 1918 Act. *United States* v. *Yermian*, 708 F.2d 365, 370 (9th Cir. 1983).

H.R. 8912, the bill finally enacted in 1934, retained the false claims section from the 1918 legislation. The new false statements section employed the phrase "in any matter within the jurisdiction of any department or agency of the United States" for the first time. While it is true that the 1934 legislation as finally adopted no longer contained language of specific intent to defraud the government, the Court has indicated that the jurisdictional language was intended to serve the same purpose. *United States* v. *Bramblett*, 348 U.S. at 507-08.

Thus, while it is noteworthy that this new phrase was adopted, the legislative history does not support the Government's interpretation that knowledge of federal jurisdiction was meant to be deleted from the culpability requirement of the statute. Rather, substitution of the "in any matter" language in lieu of a specific intent to defraud the United States was necessary because the "intent to defraud the United States" phrase would not permit prosecution in a *Cohn*-type situation where false statements were made to the government in order to effect a fraud on a third party.

Yet, in spite of the clear focus of the 1934 amendment, the Government has argued, without citation, that the revision was adopted so as to encompass "statements that were not made directly to the government and whose makers might not be aware of federal involvement." (Brief for Petitioner at 30.) No support for this assertion can be found in either the legislative history, the remarks of President Roosevelt, or the decisions of the Court. Congress, in amending the statute after *Cohn*, had no reason or intention to extend the statute to situations where an individual did not know of federal involvement.

Had H.R. 8912, as enacted in 1934, been wholly new legislation, then the Government's contention that the statute was enacted to reach makers of statements who were not aware of

federal involvement might have some force. It must be remembered, however, that H.R. 8912 was simply the recodification of an earlier statute originally drafted for the sole purpose of prosecuting claimants who dealt directly with and intended to defraud the United States. Where, as here, the legislative history traces the statute from a clear and unambiguous source and shows no intent to deviate from the source statute's original purpose, the Government's position lacks support.

Turning to the case law, the Government has argued that the 1934 amendment broadened the earlier statute in order to reach false statements made to intermediaries, even where the maker of the statement was unaware of federal involvement. The Government cites *United States* v. *Bramblett*, 348 U.S. at 507, where the Court observed that after the 1934 amendment "a greater variety of false statements were meant to be included in the statute's coverage." As previously discussed, the Government fails to point out that the Court's language referred to the problem presented by *United States* v. *Cohn*, 270 U.S. 339 (1926), namely, where a defendant presented a false statement rather than a false claim to the Government.

It was dissatisfaction with this narrow interpretation of section 35 which led to the broader language prohibiting the making of false or fraudulent statements "in any matter within the jurisdiction of any department or agency of the United States." Act of June 18, 1934, ch. 587, 48 Stat. 996 (1934). *See United States* v. *Lewis*, 587 F.2d 854, 856 (6th Cir. 1978) (per curiam); *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); *United States* v. *Bramblett*, 348 U.S. at 507 n.4.

The Court in *Bramblett* recognized that the purpose of the 1934 amendment was to close the "loophole" created by *Cohn* with respect to non-monetary claims. This is what the Court was referring to when it said "a greater variety of false statements were meant to be included." *Id.* at 507. The Court's comment cannot be read as being directed to the issue of whether section 35 applies where a false statement was made to a third party with no knowledge of federal involvement.

That issue was never before the *Cohn* Court. Instead the new language is properly read as a broadening of the *type* of statement proscribed, so far as its purpose, and a contrary suggestion was properly rejected in *United States* v. *Gilliland*, 312 U.S. 86 (1941). But to read this change, as has the Government, as also eliminating any requirement that the accused know the *destination* of his statement (a requirement clearly encompassed in the earlier act's prohibition of "claims against" or "defrauding" of the United States) is to ignore the purpose of the amendment, which was to ensure that any false statement knowingly made to the United States be prohibited, even if it does not involve a "claim" or "fraud."

Furthermore, *Bramblett* indicates that in spite of the substitution of the "in any matter language" in lieu of the previous requirement of a specific intent to defraud the United States, Congress retained knowledge of federal involvement as an element of the offense after 1934. Discussing the 1934 amendment, the Court said: "Apparently the italicized phrase was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached." 348 U.S. at 508. What *Bramblett* makes clear is that the scope of the statute was at least broad enough to reach statements made to the legislative and judicial, as well as executive branches of government. *Id.* at 506.

Moreover, the organization of the statute after the 1934 amendment also indicates that knowledge of federal involvement was intended to remain an element of the offense. It read in pertinent part:

> Whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation

> in which the United States of America is a stockholder . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Act of June 18, 1934, ch. 587, 48 Stat. 996.

Thus, in the 1934 amendment, both the proscribed conduct ("falsify . . . by any trick") and the jurisdictional language ("in any matter within the jurisdiction") followed the modifiers "knowingly and willfully." A common sense interpretation of the language leads to the conclusion that the modifiers "knowingly and willfully" referred to both elements of the offense.

The 1948 revision and recodification brought the statute to its present form; the false claims section became section 287 and the false statement provision became section 1001. The Court characterized the 1948 amendment simply as incorporating "housekeeping changes in language which are of no particular significance." *United States* v. *Bramblett*, 348 U.S. at 508. The Court went on to add: "there is no indication that the [1948] revision was intended to work any substantive change." *Id.*

However, because of the organization of the language in the 1948 statute, an ambiguity was created which gives rise to the present controversy. Because the jurisdictional phrase was transposed to *precede* the modifier "knowingly", the Government suggests that Congress intentionally deleted the jurisdictional knowledge element from the final version of section 1001. However, as *Bramblett* makes clear, the 1948 revision was not meant to be substantive. Therefore, it appears that the 1948 amendment was not prompted by a desire on the part of the legislature to clarify whether knowledge of federal jurisdiction was an element of the statute.

The 1948 amendment was a minor part of a major redrafting in 1948 of the entire Criminal Code. The comments accompanying the recodification of the entire Code indicate that revisions were made for stylistic reasons only. *See* H.R. REP. No. 304 at 2441, 80th Cong., 1st Sess. 8 (1947). Therefore, the transposition of the jurisdictional element to the beginning of the statute (the effect of which was to render the statute ambiguous on its

face) appears to be no more than an inadvertent result of sloppy drafting. It is not difficult to envision how such negligent draftsmanship could have occurred given the broad overhaul and modernization of the entire Criminal Code.[4]

The foregoing discussion comprises the legislative history of section 1001. This history convincingly demonstrates that Congress did not intend section 1001 or its antecedent statutes to apply in circumstances where an individual made statements to a third party who could fortuitously convert the person's conduct into a criminal offense by transmitting the statement to the federal government.

The cumulative legislative history instead reveals that statutory amendments were motivated by concerns unrelated to the question of jurisdictional knowledge: that the statute reach civilian claims[5]; that it impose penalties commensurate with those imposed by its predecessor statute[6]; and that the "department or agency" language include false statements made to the judicial and legislative branches.[7] The statute was never broadened to apply to situations where the defendant would be unaware of federal involvement.

C. Even If The Legislative History Of Section 1001 Is Not Conclusive, Knowledge Of Federal Jurisdiction Is A Requisite Element When The Principle Of Lenity Is Applied

Additional support for the conclusion that section 1001 should be interpreted to require knowledge of federal involvement is derived from general rules governing interpretation of criminal statutes. Even if the Court concludes that the legisla-

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[4] The overall purpose of the 1948 Code revision was to delete verbose phrases, redundant language, and archaic expressions. H.R. REP. No. 304, 80th Cong., 1st Sess. 8 (1947).

[5] *United States* v. *Bramblett*, 348 U.S. at 506 n.2. (1954).

[6] *United States* v. *Gilliland*, 312 U.S. at 94.

[7] *United States* v. *Bramblett*, *supra*, at 507.

tive history of section 1001 does not lend itself to a definitive interpretation, the policy of lenity requires that an ambiguity be resolved in favor of the Respondent. This policy was clearly set forth by the Court in *Ladner* v. *United States*, 358 U.S. 169 (1957):

> "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." . . .
> . . . "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

Id. at 177-78 (citations omitted).

At issue in *Ladner* was whether, in an action arising under the federal assault statute, a single assault affecting two officers should constitute two offenses. The Court found that neither the wording of the statute nor its legislative history pointed clearly toward one interpretation. Confronted with this ambiguity, the Court applied the policy of lenity and construed the statute in the manner least punitive to the defendant.

This policy has been reiterated frequently. *See Bell* v. *United States*, 349 U.S. 81 (1955), and citations therein; *United States* v. *Bass*, 404 U.S. 336 (1971) (legislation and language of statute ambiguous, lenity applied). Therefore, if the unintended ambiguity in the 1948 amendment creates doubts about Congressional intent, then the principle of lenity should be applied in the manner least punitive to the Respondent.

D. The Purpose Of Section 1001 Would Not Be Frustrated By A Finding That Knowledge Of Federal Jurisdiction Is An Element Of The Crime

1. As evidenced by the foregoing survey of the legislative history, Congressional amendments were never prompted by a desire to punish persons who had no knowledge of federal involvement. Comments made by Congress and the Court concerning the statute's breadth must be interpreted with this

in mind. The Governnment's assertion that the broad legislative purpose cannot be served if the jurisdictional knowledge element is retained is erroneous. Once one has thoroughly analyzed the legislative history of section 1001 and its predecessor statutes, it becomes clear that while each legislative amendment selectively extended its scope, at no time did Congress intend to eliminate knowledge of federal involvement as an element of the offense.

Although it is true that the 1934 amendment coincided with the inauguration of some of President Roosevelt's New Deal programs, it does not necessarily follow, as the Government argues, that the amendment "unquestionably was designed to broaden the statute in response to the federal government's increasing needs for protection from fraud." (Brief for Petitioner at 25). Nothing in any of the legislative history supports the Government's claim that Congress found it necessary to eliminate the jurisdictional knowledge requirement in order to protect new types of federal programs. While Congress did articulate its intent that newly-created federal programs be fully protected from fraud, there is no evidence that Congress in 1934 contemplated a situation where an individual had no knowledge of federal involvement but dealt with a third party who transmitted his statement to the government.

Significantly, not until twenty-five years after the 1934 amendment did appellate cases involving false statements made to intermediaries arise with any regularity.[8] It is appar-

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[8] The courts were faithful to the spirit of the Congressional intent when holding that a statement need not be made directly to the federal Government to be made "in any matter within the jurisdiction of a United States Department or Agency." *See, e.g., United States* v. *Hooper*, 596 F.2d 219 (9th Cir. 1979); *United States* v. *Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *United States* v. *Matanky*, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973); *United States* v. *Waters*, 457 F.2d 805 (3d Cir. 1972) (per curiam); *United States* v. *Kraude*, 467 F.2d 37 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972). In these later decisions liability was

ent that Congress had no reason to anticipate such situations in 1934, let alone reason to consider the question that would be presented if an individual did not know his statement was made in a matter within the jurisdiction of the United States.

Furthermore, the Government has omitted discussion of an additional important purpose of any criminal statute, namely, deterrence of criminal conduct. A statute which operates to punish a defendant who is unaware that he is breaking the law cannot be successful in deterring him from his course of conduct.

2. In light of the substantial legislative history and case law supporting the argument that knowledge of federal involvement is an element of section 1001, the reasoning of the courts holding to the contrary must be seriously questioned. It is submitted that the cases of *United States* v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979), *United States* v. *Lewis*, 587 F.2d 854 (6th Cir. 1978) (per curiam), and *United States* v. *Baker*, 626 F.2d 512 (5th Cir. 1980), were wrongly decided.

First of all, in considering whether a section 1001 violation required knowledge of federal involvement, the *Baker*, *Stanford* and *Lewis* courts were not presented with facts causing them to consider the implications of their holdings for future false statement cases. In each of the three cases, the defendants had engaged in conduct which was criminal initially, even absent transmission of their statements to the federal government.

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properly imposed where a defendant dealt with an intermediary because the facts evidenced that he knew his statement would ultimately reach the United States government. As the court in *United States* v. *Lewis*, 587 F.2d 854 (6th Cir. 1978) noted, "most cases in which Section 1001 has been applied have emphasized, one way or another, the defendant's awareness of federal involvement." *Id.* at 857.

In *Stanford* and *Lewis*, the defendants entered false information on State Public Assistance agency forms in order to obtain financial assistance from the Aid to Families With Dependent Children (A.F.D.C.) program. In *Baker*, the defendant falsified time sheets to her state employer who then sought reimbursement from the federal government. In each of these cases, the defendant's conduct was fraudulent; therefore, notice was provided by state law.[9] For this reason, in deciding that section 1001 did not require knowledge of federal involvement, these courts had no cause to consider the effect of such a holding where the defendant's false statement was not initially subject to criminal sanctions.

Consider the following problem:

Suppose X was approached by his neighbor who, in the course of a casual conversation, inquired whether X had ever been fired from a job. Further, suppose X lied to his neighbor because he did not want to reveal that he, in fact, had been discharged from prior employment. Certainly no argument could be made that X's lie, absent fraudulent intent, was a crime. Yet, if by chance the neighbor was approached by a representative of a federal agency which had already begun performing a security clearance on X, and the neighbor repeated the lie, X would become subject to prosecution under

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[9] Respondent Yermian concedes (as he did in courts below) that his conduct in the instant case may well be considered fraudulent, insofar as he attempted to obtain valuable employment by using false statements. Nevertheless, it is Respondent's contention that an interpretation of section 1001 which does not require knowledge of federal involvement may operate to punish persons who act without fraudulent intent. In determining Congressional intent, the issue is not whether some defendants in section 1001 cases may act fraudulently, but whether the Government's interpretation will be so broad as to reach some individuals whose statements are not worthy of criminal prosecution.

section 1001, if as the Government claims, the statute does not require knowledge of federal involvement.[10]

The *Baker*, *Lewis* and *Stanford* courts had no reason to consider the problem presented by the foregoing hypothetical, since each of the defendants engaged in behavior which was fraudulent, even absent federal involvement. The facts presented to each of the courts did not lend themselves to an examination of the implication of holding that section 1001 required no knowledge of federal involvement if an individual made a statement which was false, but not fraudulent.

When an individual's *conduct* is in fact fraudulent it is not unfair to prosecute him federally if it turns out that his statement concerns a matter within federal jurisdiction. But a wholly different situation is presented when a defendant's statement is false but not fraudulent. In such a situation, an individual's knowledge of federal jurisdiction is critically important because it is the factor which converts his conduct into a crime. Where a statement is false but not fraudulent, knowledge of federal involvement must be an element of section 1001 if the statute is to operate fairly. Without it, the statute may be used to criminally punish a defendant who is unaware that his

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[10] This very problem was singled out for discussion in *Terry* v. *United States*, 131 F.2d 40 (8th Cir. 1942), where a defendant made a false statement to a bank which later transmitted it to the federal government. In dismissing the indictment brought under the predecessor to section 1001 the court said:

> We are of the opinion that on the charge and proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams loan transaction on which the indictment rests. . . . Whether the administration would or would not obtain such cognizance depended entirely *upon the free will of other parties over whom the defendant had no control*, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independent action of other persons.

Id. at 44 (emphasis added).

false statement may interfere with serious federal functions, or, indeed, with any legitimate societal concern. Yet if the Government's interpretation of section 1001 is accepted, the statute can operate to penalize a defendant whose false statement is not punishable by state law or is not inherently fraudulent, and who therefore cannot reasonably be charged with notice of the wrongfulness of his act.[11]

Furthermore, these three courts concluded that knowledge of federal involvement was not an element of section 1001 because they did not rely on the legislative history to determine Congressional intent. Instead, these courts focused solely on the general Congressional purpose behind section 1001, namely "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. at 93.

The *Stanford* and *Lewis* courts arrived at their incorrect interpretation of section 1001 because they improperly applied *United States* v. *Feola*, 420 U.S. 671 (1975), which construes the requirements of an entirely different statute.[12] In *Feola*, the Court held that 18 U.S.C. § 111 (the federal assault statute) did not require knowledge by an assailant that his victim was a federal officer in order for him to be subject to federal prosecution. In analyzing section 111, the *Feola* Court concluded that the Congressional purposes underlying the statute were to prevent interference with the protection of federal

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[11] While it is agreed that some false statements are covered by state law, *see, e.g.*, Cal.Pen. Code § 532 (West 1970) (false pretenses) the important point is that not *all* false statements (e.g., false statement to one's neighbor about employment history) are proscribed. In these instances, no state law provides the defendant with notice of his potential criminal liability.

[12] *United States* v. *Stanford* and *United States* v. *Lewis* rely expressly on *United States* v. *Feola*. *Baker* reaches the same conclusion, using similar reasoning, without specifically citing *Feola*.

functions as well as to insure the safety of federal officers. The *Stanford* and *Baker* courts noted that section 1001 and section 111 share a similar purpose: protection of federal functions. Distracted by this similarity, these courts failed to recognize critical differences between the two statutes.

As the Court recognized in *Feola*, assault is an act which is criminal from the outset, irrespective of whether the victim is a federal officer. Notice is, in all cases, provided by state law and the inherent wrongfulness of the act. In holding that knowledge of a victim's identity was not a necessary element of a section 111 violation, the *Feola* Court indicated that Congress drafted the assault statute to provide a federal forum for insuring that a certain class of conduct, already criminal, would be vigorously prosecuted. Therefore, observed the *Feola* Court, Congress did not intend that knowledge of the victim's identity be a prerequisite to federal criminal liability.

The Court concluded that since the very nature of an assault gives notice to an assailant that his conduct is criminal, an interpretation of section 111 which did not require knowledge of the victim's identity did not act as a "snare for the unsuspecting. . . . The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." *Id.* at 685. *See also United States* v. *LeFaivre*, 507 F.2d 1288, 1297 n.14 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975). The identity of the victim, then, did not make the act a crime; rather it made the crime worthy of federal prosecution. Thus, the inclusion of a jurisdictional element in the statute was merely to insure the availability of a federal forum for prosecution.[13]

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[13] The situation is comparable to a crime under 18 U.S.C. § 659 (theft of items in interstate commerce) where knowledge of the facts giving rise to federal involvement is not an element of the crime, *United States* v. *Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), because the underlying conduct, theft, is already criminal and notice is therefore provided by state law. *See also* 18 U.S.C. § 2315 (receipt of

Feola made clear the distinction between conduct which is always criminal, and conduct which becomes unlawful solely because of the identity of the person or agency affected. This critical distinction was overlooked by the *Stanford* and *Lewis* courts. Instead those courts decided that the statutes shared a common purpose and therefore were identical as to their intent element. This reasoning failed to take into account an essential difference between the proscribed conduct in the two statutes. Each deals with a different type of problem. Whereas an assault is always a crime, and an assault on a federal officer may be punished in either a state or a federal forum, the making of a false statement to a private party in many instances may be non-criminal. It is not automatically subject to prosecution. Therefore, the *Stanford* and *Lewis* courts erred in relying on *Feola* when they analyzed the intent requirement of section 1001.

3. The Government contends that section 1001 should be construed to require the same elements as a number of federal statutes which do not require knowledge of federal involvement as an element of the offense. (Brief for Petitioner at 38-40). The problem with this argument is that it fails to note the critical difference between section 1001 and the other cited federal statutes.

Without exception, the proscribed conduct in the statutes cited by the Government is always criminal irrespective of its impact on federal functions. Thus, when an individual utters a stolen check, kidnaps a person, steals personal property, assists in a prison escape, or commits a fraud by wire, he "nonetheless knows from the very outset that his conduct is wrongful." *United States* v. *Feola* 420 U.S. at 685.

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stolen property in interstate commerce); 18 U.S.C. § 3 (accessory after the fact); 18 U.S.C. § 641 (theft of government property); 18 U.S.C. § 1201 (kidnapping). In none of these instances does knowledge of federal involvement transform innocent conduct into a criminal offense.

Thus, whether such an individual knows he is uttering a stolen *government* check, transporting a kidnap victim *across state lines* or is stealing *government* property, such knowledge does not determine his initial exposure to criminal prosecution in *some* forum. Even absent knowledge of federal jurisdiction, state law or the inherent wrongfulness of the act serves to alert him to the likelihood of criminal prosecution.

In contrast, consider another hypothetical situation which could arise under section 1001 if the Government's interpretation is accepted:

X is approached by a neighbor. They engage in a casual conversation and the neighbor asks him how many children he has. X tells the neighbor he has three children, knowing the statement is false. In fact, X has only two living children, but he chooses not to discuss the prior death of one child with his neighbor.

Contemporaneously, the neighbor is approached by a representative of the Aid to Families with Dependent Children program who is attempting to determine X's eligibility for benefits, which are in part determined by how many children X is supporting. In the course of this conversation, the neighbor repeats X's statement that he (X) has three children. The representative, in checking his files, has already noted that X's third child had died.

Because X legitimately chose not to fully discuss his family history with his neighbor, and because his neighbor fortuitously repeated his statement regarding three children to a government representative, X could be prosecuted under section 1001 if the Government's interpretation of section 1001 is accepted.

If knowledge of federal involvement is not an element of section 1001, then X will be liable even though he had no criminal intent, let alone notice of the wrongfulness of his act. Because section 1001 can reach such false statements as that of X, the Government's interpretation must be rejected.

4. Furthermore, the Government incorrectly states that retention of the jurisdictional knowledge element in section 1001 will make conviction impossible in many instances. As case law illustrates, the majority of cases arising under section 1001 will not lend themselves to a defense of lack of knowledge because such knowledge will be evidenced by the facts, even where the defendant dealt with an intermediary. *See, e.g., Ebeling* v. *United States*, 248 F.2d 429 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957) (false invoices submitted to contractor with intent that they become a part of false cost statements submitted to the government); *United States* v. *Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (false statements to New York City by mover who knew the city would use them for reimbursement by HUD); *United States* v. *Matanky*, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973), and *United States* v. *Kraude*, 467 F.2d 37 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972) (false medicare claims to an insurance company acting as agent for HEW); *United States* v. *Hooper*, 596 F.2d 219 (7th Cir. 1979) (false information to University where defendant knew University would be reimbursed by HEW).

In the few cases where a defense of "no knowledge" is attempted, normally the facts will overwhelmingly contradict the defendant's claim. Therefore, in spite of the Government's assertions to the contrary, interpreting section 1001 to include a jurisdictional knowledge element will not obstruct prosecution in the vast majority of cases. The government would be well protected in most cases simply by placing a conspicuous warning regarding federal jurisdiction on agency forms. Then, a jury presented with a defendant who claims he did not see the conspicuous warning (as did Respondent in the instant case) will merely have to decide whether this is a plausible claim.

5. It is logical that section 1001 contain a knowledge requirement absent in the cited federal statutes. Safeguards absent from section 1001 are built into the other statutes since an individual will be punished only in situations where state law provides notice, and where his intent is criminal. In con-

trast, in section 1001 knowledge of federal jurisdiction is the sole element which converts non-blameworthy statements into a federal offense. Absent such a requirement, no notice will be provided in some situations. While it is true that in a few exceptional instances, criminal statutes properly make certain types of conduct illegal absent any knowledge requirement, these statutes are limited to acts whose inherent danger creates notice of their potential illegality, *United States* v. *Freed*, 401 U.S. 601, 609 (1971), or statutes which are essentially regulatory in nature, reaching acts *malum prohibitum* and subject to only minor penalties. *Morissette* v. *United States*, 342 U.S. 246 (1952). A violation of 18 U.S.C. § 1001 lies nowhere near either of these categories.

6. Finally, the Government claims that the inclusion of a requirement of knowledge of federal jurisdiction in section 1001 would make prosecution more difficult and restrict the effectiveness of the statute in fullfilling its purpose. The Court rejected a similar argument in *Morissette* v. *United States*, 342 U.S. at 259: "Of course the purpose of every statute would be 'obstructed' by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us to learn [Congress' intent]."

E. An Interpretation Of Section 1001 Which Does Not Require Proof That An Individual Knows His False Statement Was Within Federal Jurisdiction Would Unfairly Punish Persons Whose Conduct Does Not Merit Criminal Prosecution

The Government fails to recognize that there are situations in which a defendant "will be *unfairly* surprised if his conduct turns out to violate section 1001." (Brief for Petitioner at 36). The Government is wrong in insisting that omission of a jurisdictional knowledge requirement will in no instance create a "snare for the unsuspecting." The Government is incorrect in arguing that in no instance can individuals "claim plausibly that they believed they were engaging in innocent conduct," and that "the making of a statement one knows to be false must be

regarded as *malum in se*." (Brief for Petitioner at 34). A statement which is false but is not intended to influence the actions of others need not be considered *malum in se*.[14]

As previously discussed, it is entirely plausible that an individual could knowingly and willfully make a statement which was false but not deserving of the moral condemnation of the community. While Respondent Yermian in the instant case consciously set out to defraud his employer and in so doing engaged in wrongful conduct, this does not resolve the issue in instances where the false statement is not intended to influence the action of another person or entity and its purpose is merely to avoid disclosure of personal facts. Thus, the individual who lies to his neighbor about how many children he has simply because he does not wish to discuss the death of one child is not culpable in the same sense as Mr. Yermian, because such a person was not intending to influence the actions of his neighbor, let alone a government agency.[15] Such an individual can rightly claim that he was not involved in wrongful conduct, insofar as it cannot be argued that his conduct should be subject to criminal prosecution.

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[14] It is not necessary to digress into philosophical concepts of wrongfulness to resolve the issue before the Court. The term *malum in se* is simply meant to connote an action inherently subject to moral condemnation of the community.

[15] The Government relies on *Terry* v. *United States*, 131 F.2d 40 (8th Cir. 1942), to allay concerns of the Court that the hypothetical conduct described in the foregoing example would be subject to prosecution under section 1001. Such reliance is misplaced.

In *Terry*, the defendant made a false statement to a lending institution which only *later* chose to avail itself of federal funds. Since the federal involvement and the false statement were not contemporaneous, the court held that it would be contrary to legislative purpose to sustain a conviction under the statute. 131 F.2d at 44. The Government may claim that an example such as the individual who lies to his neighbor about his family history would not fall within section 1001 if the neighbor only *later* communicated the information

Therefore, the requirement that the government prove that the defendant knew his statement was false at the time it was made is not sufficient for the purpose of "separating blameworthy conduct from innocent conduct." (Brief for Petitioner at 34). Since the Government's reading of section 1001 would include a false statement not intended to influence the actions of others, there is a danger that the defendant will be unfairly surprised if his conduct turns out to violate section 1001.

Thus, it is not true that all defendants in section 1001 cases may be analogized to the Respondent in *Feola*. Unlike the perpetrator of an assault, the individual who lies to his neighbor about how many children he has does not know "from the very outset that his planned course of conduct is wrongful." *United States* v. *Feola*, 420 U.S. at 685. An individual who lies to his neighbor only to avoid the disclosure of personal facts is instead engaging in behavior more analogous to that of the defendant in *Lambert* v. *California*, 355 U.S. 225 (1957).

In *Lambert*, the defendant was convicted under a Los Angeles ordinance which made it criminal for a convicted felon to remain in the city for more than five days without registering with law enforcement officials. The Court indicated that the following deficiencies in the Los Angeles ordinance were objectionable: the statute provided for harsh punishment absent any criminal intent on behalf of the defendant, and further, the mere existence of the ordinance did not provide adequate notice to the individual of any wrongfulness of her remaining in the city without registering as a felon. Additionally, the Court struck down the ordinance since the mere act of remaining in Los Angeles was not worthy of criminal prosecution. If the Government's interpretation of section 1001 is accepted, it will, in some circumstances, punish an individual

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to a federal agency since there would be no agency jurisdiction at the time the statement was made. See Brief for Petitioner at 31. This fails to take into account that there will be some situations in which the governmental involvement and the making of the statement will be contemporaneous.

who lacks notice as well as knowledge of the element which converts his otherwise non-reprehensible statement into criminal behavior.

The third reason which led the Court in *Lambert* to strike down the Los Angeles ordinance is that: " 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' " 355 U.S. at 229, quoting *The Common Law* at 50. As Mr. Justice Douglas, the author of the majority opinion in *Lambert* later stated, "being in Los Angeles is not *per se* blameworthy." *United States* v. *Freed*, 401 U.S. 601, 608 (1971). Similarly, an individual who lies to his neighbor about how many children he has is not *per se* blameworthy, since he is unaware of the material element which will convert his statement into a crime. Such an individual is not worthy of criminal prosecution, but could be prosecuted if the Government's interpretation is accepted.

F. Since The Legislative History Of Section 1001 Is Clear, Neither Policy Concerns Nor Modern Trends In Statutory Drafting Can Justify Ignoring Congressional Intent

1. The Government has cited numerous examples of federal statutes which require no proof of knowledge of federal jurisdiction. (Brief for Petitioner at 38-39). In all of these statutes, the jurisdictional element serves no purpose other than providing a forum for federal prosecution. The Government claims that this is also true of section 1001. However, analysis of two cases cited by the Government demonstrate why section 1001 must be interpreted differently.

In *United States* v. *LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975), the defendants were convicted of clearing stolen checks which had passed through interstate banking channels. Rejecting the defendants' claims

that they neither intended nor knew that interstate commerce facilities were involved, the court said:

> Congress's omission of any knowledge requirement with respect to the use of facilities in interstate commerce makes good sense. The use of facilities in interstate commerce is . . . nothing more than the jurisdictional peg on which Congress based federal jurisdiction. . . . The use of interstate facilities adds nothing whatsoever to the "criminality" of the person who is already engaged in one of the named unlawful activities. Thus, there is no need to require any mental element with respect to use of interstate facilities, since any mental element that Congress did write in would still not be any part of the *mens rea* of the criminal activity itself.

Id. at 1297 n.14.

In its discussion of statutes such as the Travel Act (18 U.S.C. § 1952), in which a jurisdictional element serves no purpose other than affording a forum for federal prosecution, the *LeFaivre* decision is helpful in understanding the ways in which section 1001 operates differently.

LeFaivre presented the typical situation in which a defendant engaged in unlawful conduct. Knowledge of the use of interstate facilities to effect the crime (cashing stolen checks) added nothing to the underlying criminality of the conduct. Thus, it was entirely proper for Congress to omit a mental element with respect to the use of interstate facilities, since "any mental element that Congress did write in would still not be any part of the *mens rea* of the criminal activity itself." *Id.*

These same principles were underscored in *United States* v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). In *Blassingame*, the court held that knowledge of the use of interstate communication was not an element of 18 U.S.C. § 1343 (fraud by wire). In explaining why the statute could fairly dispense with a jurisdictional knowledge requirement the court remarked that the statute did not "condition guilt upon knowledge that interstate communication is used." *Id.* at 330. The gravamen of the offense lay in the

fraudulent scheme itself. Nothing was "added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme." *Id.*

The foregoing principle is equally applicable to every federal statute cited by the Government. Each cited statute involves underlying conduct criminal from the outset. Notice is provided either by state law or the inherent wrongfulness or dangerousness of the act. For this reason those statutes can fairly operate without a scienter requirement as to the jurisdictional element. Since the behavior is criminal irrespective of federal involvement, knowledge as to that element in no way increases the offender's guilt or blameworthiness. Therefore, as no additional notice is necessary, the scienter element as to federal jurisdiction can be justly omitted.

However, the principle does not apply to false statements within the purview of section 1001. As previously demonstrated, some statements, though false, are not of a nature serious enough to warrant criminal prosecution. Therefore, knowledge of federal involvement is the *sole* element which converts non-reprehensible behavior into a federal criminal offense in section 1001.

2. The Government urges the Court to construe section 1001 in light of modern trends in legislative *drafting* of criminal statutes. The modern approach is exemplified in the draft of the proposed federal Criminal Code, which to date has not been enacted into law. Under such an approach, jurisdiction as an element of the offense is separated from the basis for exercising federal criminal jurisdiction.

While such an approach in drafting is preferable, the Government fails to recognize that section 1001 was drafted in an era in which an opposite approach was employed. Prior to the 1970's, the mode used in drafting criminal statutes was to state the basis for exercising federal criminal jurisdiction

together with the basic criminal misconduct as an element of the offense.[16] S. REP. 97-307, 97th Cong., 1st Sess. 31 (1981).

Section 1001 was not drafted with modern principles in mind. The formats of the 1934 and 1948 amendments employ exactly the construction that one would expect had Congress intended to include knowledge of federal involvement as an element of the crime.

Were section 1001 a statute drafted after 1970, it would be plausible to conclude that since the jurisdictional elements are not separated, knowledge of facts giving rise to federal jurisdiction was not a separate element of the offense. However, since the 1948 statute was drafted thirty-six years ago, and because the legislative history indicates that it evolved from a statute requiring a specific intent to defraud the United States, the only logical conclusion is that section 1001 requires knowledge of federal jurisdiction as an element of the offense. Therefore, the Government's comment at page 40 of its brief that "there is no reason to assume that Congress intended in the case of section 1001 to depart from the normal practice of using jurisdictional language merely for the purpose of providing the basis for federal court jurisdiction, not also as a supplement to the culpability element" is misleading.

Additionally, when the Government refers to the "normal practice" of using jurisdictional language merely to afford a basis for federal prosecution, it fails to qualify those comments with an explanation that this is the normal practice, not in a statute like section 1001, (where knowledge of federal involve-

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[16] The draft federal Criminal Code acknowledges that the *historical* approach to drafting criminal statutes has often resulted in formulations of offenses which "unnecessarily require proof that the defendant knew or intended that his conduct would violate a Federal interest." S. REP 97-307, 97th Cong., 1st Sess. 32 (1981). Thus, while Congress may choose, in a *new* Criminal Code, to dispense with the necessity of such proof, the Government ignores that section 1001 was drafted in keeping with the historical approach.

ment is the sole element which may convert behavior into a federal crime,) but rather in statutes where the underlying conduct is already criminal and knowledge of federal involvement does not form the initial basis of liability.

3. The Government has discussed at length a wide variety of problems which can arise when an individual makes a false statement to an intermediary and later claims no knowledge of federal involvement. If that intermediary shares an important role along with the federal government in performing national tasks then this obviously has a detrimental effect on the operation of governmental functions. The most unsettling examples cited by the Government include the potential effect of a false statement made in a matter involving national security or the health and welfare of society. It is understandable that the Government would wish to resort to section 1001 as a panacea to combat the wide range of criminal abuses which threaten modern federal functions.

There is, however, a pitfall inherent in focusing on present day problems in an attempt to construe the elements of a 1934 statute. A focus on serious contemporary problems—such as the potentially dangerous effect of a false statement in a matter concerning national security or nuclear energy—diverts attention from the real issue presented in the instant case, namely an understanding of the concerns which prompted the enactment of the statute fifty years ago. As the foregoing examination of the legislative history reveals, the 1934 amendment was adopted in response to Congressional concern that the statute would no longer reach non-monetary frauds against the government. Concerns over the effect of false statements to intermediaries which could drastically interfere with national security were not part of the legislative debates at the time of the amendment.

Had those problems manifested themselves in 1934, rather than many years later, it is entirely possible that Congress would have chosen to eliminate jurisdictional knowledge as an element of the offense. Unfortunately, section 1001 was not

drafted broadly enough to reach every situation where a false statement affects an important federal concern. The remedy to this problem is not to expand the coverage of section 1001 but to address such concerns to Congress. If in light of the legislative history the Court adopted Respondent's interpretation of section 1001, then Congress may likely choose to amend section 1001 in the future or enact new legislation to accommodate modern concerns.

II. THE COURT'S INSTRUCTION TO THE JURY THAT IT COULD CONVICT IF "DEFENDANT KNEW OR SHOULD HAVE KNOWN" HIS INFORMATION WOULD BE SUBMITTED TO A GOVERNMENT AGENCY DID NOT PROPERLY INSTRUCT ON THE SCIENTER REQUIREMENT OF 18 U.S.C. § 1001

A conviction under 18 U.S.C. § 1001 requires knowledge that the statement is being made to a government agency. The district court, however, instructed the jury that it could convict the defendant if it found "that the defendant knew or *should have known* that the information was to be submitted to a government agency." J.A. at 25 (emphasis added). The Respondent timely objected to the language "should have known."

The instruction as given was erroneous as to the requirements for a finding of knowledge. By instructing the jury that it could convict if it found that the defendant "should have known" the destination of the information he submitted, the court allowed the jury to convict on an objective, rather than a subjective standard of knowledge.[17]

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[17] Even if this were an appropriate case for a *Jewell* instruction, *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951, (1976) the court's instruction omitted both critical elements of such an instruction. These elements are "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." *Id.* at 704 n.21. *See also United States* v. *Esquer-Gamez*, 550 F.2d 1231, 1235 (9th Cir. 1977).

The court's instruction allowed the jury to find knowledge or its equivalent simply on the basis that Respondent "should have known" that his statements were going to the United States Government. Accordingly, the jury, under the court's instruction, could have convicted the Respondent without any finding that he actually was aware of a high probability that his statements affected a federal interest. The jury simply could have found that a reasonable person would have believed in the existence of that fact, which is exactly what the term "should have known" implies. In addition, the jury could have convicted even though it found Respondent actually believed his statements were not directed to the government.

The Government suggests that if section 1001 requires knowledge of federal involvement, the requirement should be fulfilled by a finding of "recklessness." The Government then argues that the jury was appropriately instructed as to such a requirement. The vague instruction of the district court is a far cry from the explicit term of "recklessness" urged by the Government.[18] The phrase "should have known" is reasonably susceptible of interpretations which involve *no* scienter as to federal involvement, but which instead improperly permit the jury to find that the defendant morally should have known or should have read the warning on the form.

Thus, a juror could have accepted Respondent's testimony, concluding that he did not read any references to the federal government on the forms in question, and that he simply believed that this was a private questionnaire for the purposes of his employer. Such a juror would not have found that the knowledge of federal involvement was "reckless." But that juror could easily, under the court's instruction, have con-

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[18] The term "recklessness" may be defined as "an attitude of mental indifference to obvious risks" and refers to the mental state "of a person who actually foresees the consequences of his conduct and, though not seeking those consequences, deliberately takes the risk of their happening." 17 Mod. L. Rev. 294, 304 (1954).

cluded that people *should* read every word in a form, and that for that reason, Mr. Yermian *should* have known about federal involvement. Accordingly, the jury could easily have convicted defendant without finding the scienter which the Government suggests as an alternative to actual knowledge.

Accordingly, should the Court find that the appropriate standard is one of "recklessness," the matter should be remanded for a new trial with an appropriate jury instruction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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